

INFORMATION

Practice of Medicine by Private Nonprofit Hospitals Held Illegal

Recently, the State Board of Medical Examiners requested the opinion of Fred N. Howser, Attorney General of California, as to whether a private nonprofit hospital is permitted by law to practice medicine, and, if not, as to whether such a hospital could legally employ a pathologist on a salary basis.

On May 19, 1948, the Attorney General rendered an opinion to the State Board of Medical Examiners, holding, first, that a private nonprofit hospital may not practice medicine, and, second, that the employment on a salary basis of a pathologist by such a hospital would constitute the unlawful practice of medicine by the hospital.

The opinion, in full, follows:

OPINION of

Fred N. Howser, Attorney General
E. G. Funke, Deputy Attorney General

The Board of Medical Examiners has submitted the following questions:

1. Is a corporation or an association of laymen operating a private, nonprofit hospital permitted to practice any system or mode of treating the sick or afflicted in this State?

2. If a corporation operating a private, nonprofit hospital enters into a contract with a physician under which the physician will perform professional services in the hospital and receive a fixed salary, and the corporation will thereupon bill the patient for the professional services rendered by the physician at rates that have no bearing on the physician's salary, is the corporation violating any of the provisions of the Medical Practice Act?

The conclusions reached are summarized as follows:

1. No one is permitted to practice any system or mode of treating the sick or afflicted in this State unless he is licensed in accordance with the provisions of section 2000 et seq., Business and Professions Code. Corporations or other artificial legal entities are specifically mentioned in section 2008 as having no professional rights, privileges or powers, and may therefore not be licensed to so practice.

2. The employment of a licensed physician by a corporation and the subsequent billing of the patients by the corporation, as referred to in the second question, would constitute illegal practice of a system or mode of treating the sick or afflicted in this State and is therefore prohibited by law.

ANALYSIS

The Board of Medical Examiners advises that a private, nonprofit hospital operating in the State and owned by a corporation, contemplates entering into

a contract with a duly licensed physician and surgeon who specializes as a pathologist. They propose that the physician and surgeon will perform professional services for hospital patients and receive therefor a fixed salary. The corporate owner of the hospital proposes to separately bill each private patient for the professional services that have been rendered to such private patient by the pathologist. They propose that such charges are to be independent of the ordinary regular charge for hospital bed, board and usual hospital services and further, that the rate of charge will have no bearing on the salary that the pathologist will receive from the corporation.

The courts have made it abundantly clear, as is hereafter shown, that corporations are prohibited from engaging in the practice of any system or mode of treating the sick or afflicted in this State. The pronouncements of the courts also, in our opinion, require the conclusion that the arrangement contemplated by the hospital in question falls within the same prohibition.

The California Legislature has enacted a Corporations Code. In the Corporations Code there are found various provisions governing the formation, powers and duties of corporations as a whole. Since a corporation is a "creature created by statute," it has only such powers as the statutes give to it. Nowhere in the Corporations Code is a corporation given specific authority to practice the healing arts.

We must, of course, call attention to the fact that certain nonprofit corporations may be formed for the purpose of defraying or assuming the cost of professional services of licentiates of the healing arts. Section 9201, Corporations Code, formerly Section 593(a) Civil Code, so provides. However, the same section except as expressly permitted therein does not authorize the formation of any corporation for the purpose of rendering the professional services regulated by Division 2 of the Business and Professions Code. Likewise, Chapter 1 of Division 2 of the Health and Safety Code, governing the operation of clinics and hospitals, specifically provides (section 1214) that the provisions of said chapter do not authorize any person other than a licentiate of a healing art to engage *directly or indirectly* in the practice of medicine.

The opinion of the Supreme Court in California Physicians' Service v. Garrison, 28 Cal(2d) 790, construed the provisions of Corporations Code 9201, formerly Civil Code 593(a), and particularly the authorizing of the incorporation of a physicians' service. The court therein states (page 802): "the Legislature, by enacting section 593(a) of the Civil Code, expressly authorized the organization of cor-

porations such as California Physicians' Service. By this enactment *the state's social policy in regard to the corporate practice of medicine, to the limited extent specified, has been determined* and the courts are bound thereby. [Emphasis added.]

Further, a corporation, although considered by law as a legal entity, and to have in many respects all the rights and privileges of an individual person, nevertheless is physically unable to fulfill the educational requirements or to take the examination required of all persons who seek to secure a license to practice the healing arts. Thus, even though section 2008, Business and Professions Code, did not specifically state that a corporation has no professional standing, nevertheless it would be a physical impossibility for a corporation to be a licentiate of a healing art.

Our courts have on numerous occasions held that a corporation may not engage in the practice of medicine. The opinion of the Supreme Court in *Pacific Employers Insurance Co. v. Carpenter*, 10 Cal. App. (2d), 592, 594, contains a comprehensive discussion which is pertinent. The following quotation summarizes the court's views on this subject:

"It is well settled that neither a *corporation nor any other unlicensed person or entity may engage, directly or indirectly*, in the practice of certain learned professions including the legal, medical and dental professions. [Cases cited.] Under the foregoing authorities it is clearly declared unlawful for a corporation to indirectly practice any of said professions for profit by engaging professional men to perform professional services for those with whom the corporation contracts to furnish such services. In other words, said authorities declare that said professions are not open to commercial exploitation as it is said to be against public policy to permit a 'middleman' to intervene for profit in establishing the professional relationships between the members of said professions and the members of the public." [Emphasis added.]

In *People v. Pacific Health Corporation*, 12 Cal (2d), 156, 158, the court stated that: "It is an established doctrine that a corporation may not engage in the practice of such professions as law, medicine or dentistry." [citing cases.] The appellant, Pacific Health Corporation, contended, however, that it did not itself undertake to perform medical services, but merely to furnish competent physicians; that the physicians and surgeons were not to be employed by it on a salary basis, nor directed by it, but were to be compensated for actual professional services after they were rendered; and the corporation's theory was that the doctors, under its arrangement, were to be independent contractors and that, therefore, the corporation would be absolved of the charge of practicing medicine. The court said:

"We are unable to agree that the policy of the law may be circumvented by technical distinctions in the manner in which the doctors are engaged, designated or compensated by the corporation. The evils of divided loyalty and impaired confidence would seem to be equally present whether the doctor received benefits from the corporation in the form of salary or fees. Any freedom of choice is destroyed, and the elements of solicitation of medical business and lay control of the profession are present whenever the corporation seeks such business from the general public and turns it over to a special group of doctors."

This argument that the mere ownership of a hospital where medical services are rendered by the owners' licensed employees does not in itself constitute the practice of medicine (i.e., that the practice of medicine involves actual treatment of persons), was also rejected by our courts when applied to the practice of dentistry. See *Painless Parker v. Board of Dental Examiners*, 216 Cal. 285, 296. Appellant in that case contended that there was a distinction between the practice of dentistry which the statutes undertook to regulate, and the purely business side of the practice and that the management and conduct of the business side by a layman was not prohibited by the statute, and that such attempted prohibition would be unconstitutional. We refer to the well considered opinion of the court, wherein are given the reasons for the rejection of this contention made by appellant.

It may be contended that the pathologist in the situation presented would merely examine and diagnose an illness and therefore would not be practicing medicine. But our courts have held that diagnosis is as much a part of the practice of medicine as is the administration of remedies. In fact, section 2141, Business and Professions Code, declares that one who diagnoses any illness is engaging in the practice of medicine (see *People v. Jordan*, 172 Cal. 391).

Throughout the opinions cited one will note that the courts have indicated that the practice of medicine by corporations for profit, through the employment of licensed physicians, has a tendency to debase the profession, is not in the interests of the safety, health and welfare of the public, and therefore is contrary to public policy. The right to practice medicine and surgery under a license by the State is a personal privilege. It cannot be delegated. Therefore, a corporation or other unlicensed person may not engage in the practice of medicine by employing one who is licensed to do the things which constitute the practice of the profession. Were the rule otherwise, one would find a licensed physician accepting directions and instructions in the diagnosing and treating of ailments from a corporation or from an individual who is not a licensed practitioner.